

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

FREDERICK AND CONNIE WANG )

Plaintiffs, )

v. )

C.A. No. N15C-03-066 WCC

HOCKESSIN CHASE L.P.; TOLL )

BROTHERS INC.; TOLL BROS. )

INC.; TENBY HUNT INC.; TOLL )

ARCHITECTURE INC.; ARCHER )

EXTERIORS INC.; MAR-JOHN )

MASONRY INC.; G.L. ROSSETTI )

a/k/a ROSSETTI GL; THOMPSON )

CONSTRUCTION, INC. and )

JAMES B. STORM )

Defendants.

Submitted: June 15, 2018  
Decided: November 9, 2018

**Defendants' Motions to Dismiss - DENIED**

**MEMORANDUM OPINION**

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**CARPENTER, J.**

Defendants Hockessin Chase L.P., Toll Brothers Inc., Toll Bros. Inc., Tenby Hunt Inc., and Toll Architecture Inc. (jointly “Toll Defendants”) move to dismiss Count Six of Plaintiffs’ Amended Complaint (“Amended Complaint”), filed by Plaintiffs Frederick and Connie Wang (the “Wangs” or “Plaintiffs”), for lack of jurisdiction. Toll Defendants also renew their request for an order dismissing Counts One through Five of Plaintiffs’ Amended Complaint for lack of subject matter jurisdiction. Plaintiffs’ Amended Complaint also alleges claims against Archer Exteriors Inc., Mar-John Masonry Inc., G.L. Rossetti a/k/a Rossetti GL, Thompson Construction, Inc., and James B. Storm. They are not parties to this Motion, but they and the Toll Defendants will be collectively referred to as “Defendants” in this Opinion.<sup>1</sup>

This matter arises out of the construction and sale of a new home located at 12 Harvest Lane in New Castle County, Hockessin, Delaware (the “Property”).<sup>2</sup> Toll Defendants’ Motion to Dismiss presents the issue of whether this Court has subject matter jurisdiction over Plaintiffs’ claims or whether the parties are bound by the binding arbitration clause in the Agreement of Sale (the “Contract”), rather than the

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<sup>1</sup> Count One is against Toll Brothers Inc., Toll Bros. Inc., Archer Exteriors Inc., Mar-John Masonry Inc., G.L. Rossetti a/k/a Rossetti GL, Thompson Construction Inc., and James B. Storm. Count Two is against Toll Architecture Inc. Count Three is against Hockessin Chase L.P. and Tenby Hunt Inc. Count Four is against Hockessin Chase L.P., Tenby Hunt Inc., Toll Brothers Inc., and Toll Bros. Inc. Count Five is against Hockessin Chase L.P., Tenby Hunt Inc., Toll Brothers Inc., and Toll Bros. Inc.

<sup>2</sup> Am. Compl. ¶¶ 2,13.

non-binding arbitration clause in a separate home warranty (“Warranty”) included in the purchase of their home. For the following reasons, Toll Defendants’ Motions are **DENIED**.

## I. FACTS

As stated above, Toll Defendants filed this Motion to Dismiss for lack of subject matter jurisdiction in opposition to Plaintiffs’ claims against Hockessin Chase L.P., Tenby Hunt Inc., Toll Brothers Inc., and Toll Bros. Inc. for consumer fraud relating to water leaks and damage to their home.<sup>3</sup> Toll Defendants also renew their Motion to Dismiss Plaintiffs’ Counts One through Five—negligent construction, negligent design, breach of contract, breach of express warranty, and breach of implied warranty—for lack of subject matter jurisdiction.<sup>4</sup> These claims arise from the Contract signed by the Wangs and Defendants Hockessin Chase L.P. by Tenby Hunt, Inc. for the construction and sale of the Property.<sup>5</sup> On May 13, 2001, Plaintiffs executed the Contract for the purchase of a new home<sup>6</sup> and received the deed on January 28, 2002.<sup>7</sup> It was at this time that Plaintiffs received the builder’s Warranty for the Property.

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<sup>3</sup> Am. Compl. at 12.

<sup>4</sup> Toll Defs.’ Mot. to Dismiss at 2.

<sup>5</sup> The Wangs, in their reply brief, point out that Hockessin and Tenby are separate entities but were listed as the seller. They also assert that “they were led to believe that they were contracting with Toll Brothers and had never heard of these entities.” Pls.’ Answ. Br. Opp’n Defs.’ Mot. to Dismiss at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

According to the Amended Complaint, the Property “began to experience isolated leaks in September of 2013.”<sup>8</sup> The Property also presented defects with its window(s), door(s), and stucco.<sup>9</sup> The Plaintiffs contend the “Property suffers from numerous, serious design and construction defects that have resulted and will result in severe water and moisture penetration, deterioration, unattractiveness, loss in marketability and market value, structural and physical instability, and other dangerous conditions.”<sup>10</sup> The design and construction defects allowed water to infiltrate the building envelope, which caused significant damage and requires costly repairs.<sup>11</sup>

As a result of the Property damage, Plaintiffs filed this action on March 9, 2015, and subsequently amended their Complaint in May 2015. Shortly thereafter, in July 2015, Toll Defendants filed a Motion to Dismiss or, in the alternative, requested a stay of the proceedings because the Contract includes an arbitration provision which requires the parties to arbitrate disputes arising from the Contract or the construction or the conditions of Plaintiffs’ home.<sup>12</sup> On August 18, 2015, this Court heard oral arguments on Toll Defendants’ Motion to Dismiss. The Court ultimately issued a stay and requested that the parties engage in some level of

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<sup>8</sup> Am. Compl. ¶ 19.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 14.

<sup>11</sup> *Id.* at ¶ 17.

<sup>12</sup> Pls.’ Ex. A. Contract ¶ 11 [hereinafter Contract].

arbitration to see if the dispute could be resolved without further litigation.<sup>13</sup> After a two-day hearing on May 22 and 23, 2017, the arbitrator issued his decision on May 31, 2017 (generally, the “Arbitration”). The arbitrator “issued an award that the Wangs consider totally inadequate and which they believe is at direct odds with the evidence presented to the arbitrator.”<sup>14</sup>

On July 31, 2017, two months after the Arbitration, the Wangs provided a status report to the Court stating that the Arbitration had failed to resolve the dispute, but the parties were in settlement discussions.<sup>15</sup> The Court ordered that the prior litigation stay be lifted and stated that the Court’s staff would contact the parties to establish a scheduling order.<sup>16</sup> Toll Defendants later responded to the Wangs’ status report and denied that any settlement discussions were ongoing and claimed that the Arbitration was “final and binding.”<sup>17</sup> The Plaintiffs responded denying binding arbitration and alleged the Arbitration was nothing more than a non-binding effort “to see if it can be worked out.”<sup>18</sup>

On October 3, 2017, the Toll Defendants expressed to the Court that they would be filing a separate action in the Court of Chancery to confirm the arbitration

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<sup>13</sup> Pls.’ Ex. F, Mot. to Dismiss Tr. 25:15-23, 26:1-7.

<sup>14</sup> Pls.’ Letter to Court, Trans. ID. 60914871, July 31, 2017.

<sup>15</sup> *Id.*

<sup>16</sup> Court’s Letter to Counsel, Trans. ID. 61006420, Aug. 18, 2017.

<sup>17</sup> Toll Defs.’ Letter to Court, Trans. ID. 61257506, Oct. 18, 2017.

<sup>18</sup> Pls.’ Letter to Court, Trans. ID. 61265113, Oct. 20, 2017.

award.<sup>19</sup> Toll Brothers filed that action on October 10, 2017.<sup>20</sup> On October 13, 2017, this Court ordered the parties to attend an in-chambers conference on October 23, 2017. The Court, in the conference, requested additional briefing regarding the jurisdiction issues raised by the Toll Defendants regarding Count Six. The Court did not require additional briefings regarding Counts One through Five.

In their briefings, as well as in their oral arguments, Toll Defendants provided several reasons for why this Court lacks subject matter jurisdiction and continued to argue that the Plaintiffs have failed to comply with the Court's briefing request and have "submitted as their response a repackaged version of their original opposition to the Motion to Dismiss...."<sup>21</sup> The Wangs contend that the Toll Defendants seek to enforce an unconscionable arbitration provision that was superseded by the issuance of the Warranty and that the Arbitration was non-binding.<sup>22</sup> While Toll Defendants have filed two separate Motions to Dismiss, they both relate to the arbitration provisions contained in the Contract and the Warranty at issue here. This is the Court's decision as to this dispute.

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<sup>19</sup> Pls.' Ex. K at 1.

<sup>20</sup> The Toll Defendants' Motion to Dismiss was heard by Chancery Court on June 5, 2018. Chancery Court stayed consideration of the Motion pending resolution in the Superior Court.

<sup>21</sup> Toll Defs.' Mot. to Dismiss at 3.

<sup>22</sup> Pls.' Answ. Br. Opp'n Toll Defs.' Mot. to Dismiss at 2; *see also* Pls.' Ex. C. §VII at 10 [hereinafter Warranty].

## II. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 12(b)(1), the Court will grant dismissal when it lacks jurisdiction over a complaint's subject matter.<sup>23</sup> The question of whether the Court has jurisdiction over the subject matter of a controversy "must be determined in the first instance by the allegations of the complaint."<sup>24</sup> In making this determination, the Court must view the factual allegations of the complaint as true.<sup>25</sup> Dismissal is proper where a claim amounts to a "purely equitable cause of action" because the "Superior Court's jurisdiction lies in matters of law, as opposed to the Court of Chancery's jurisdiction, which lies in matters of equity."<sup>26</sup> The Consumer Fraud Act "provides that a private cause of action 'may be brought in any court of competent jurisdiction in this State....'"<sup>27</sup> As such, this Court continues to have jurisdiction over this dispute. If this Court finds a binding arbitration occurred, then the Toll Defendants could appropriately request the Court of Chancery to enforce that decision. Until then, this is a dispute of law which this Court has jurisdiction over, not the Court of Chancery.

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<sup>23</sup> *Dickerson v. Murray*, 2015 WL 447607, at \*2-3 (Del. Super. Ct. Feb. 3, 2015).

<sup>24</sup> *Stidham v. Brooks*, 5 A.2d 522, 524 (Del. 1939).

<sup>25</sup> *Reybold Venture Grp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at \*2 (Del. Super. Ct. Jan. 20, 2009).

<sup>26</sup> *Dickerson*, 2015 WL 447607, at \*2-3.

<sup>27</sup> *Airbase Carpet Mart, Inc. v. AYA Associates, Inc.*, 2015 WL 9302894, at \*5 (Del. Super. Ct. Dec. 15, 2015) (citing 6 Del C. § 2525(a)).

### III. DISCUSSION

Toll Defendants urge the Court to grant their Motion to Dismiss because, in Count Six, Plaintiffs allege violations of the Consumer Fraud Act relating to the sale of the Property, thus making the arbitration provision in the Contract applicable to Count Six as well as Plaintiffs' five remaining claims.<sup>28</sup> Specifically, the Toll Defendants assert that this arbitration clause encompasses all contract and warranty issues as well as "...all other torts and statutory causes of action ("Claims") ..."<sup>29</sup> Toll Defendants also argue that this Court does not hold exclusive jurisdiction over violations of the Consumer Fraud Act, as Plaintiffs contend, and that this Court's jurisdiction can be divested by a valid arbitration clause.<sup>30</sup> In fact, the Consumer Fraud Act "provides that a private cause of action 'may be brought in any court of competent jurisdiction in this State....'"<sup>31</sup> Previous case law has found that an arbitration clause can divest a court of competent jurisdiction, if valid and enforceable.<sup>32</sup> Toll Defendants argue that because the Contract includes a valid and enforceable arbitration provision, this Court must divest its jurisdiction and enforce the Contract's binding arbitration provision.<sup>33</sup>

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<sup>28</sup> Toll Defs.' Mot. to Dismiss at 2.

<sup>29</sup> Contract ¶ 11.

<sup>30</sup> Toll Defs.' Mot. to Dismiss at 5.

<sup>31</sup> *Airbase Carpet Mart, Inc.*, 2015 WL 9302894, at \*5.

<sup>32</sup> *Id.*

<sup>33</sup> Toll Defs.' Mot. to Dismiss at 5.



Plaintiffs, on the other hand, argue there are many substantive arbitration issues that must be resolved before the Wangs may be forced to submit to binding arbitration.<sup>34</sup> Such issues include which arbitration clause controls,<sup>35</sup> whether or not the Wangs agreed to arbitrate,<sup>36</sup> and if the arbitration provisions are unconscionable and even enforceable.<sup>37</sup> In addition, Plaintiffs argue that if the Court concluded there are no competing arbitration provisions and the Contract's arbitration provision controls, or that there is no need for a jury to consider the conscionability of these provisions, "the Wangs must still be free to pursue their claims against the Defendants that were not parties to the Contract."<sup>38</sup>

Toll Defendants do not directly respond to Plaintiffs' assertions. Instead, they argue that the Plaintiffs have failed to address the narrow issue identified by the Court—whether it has jurisdiction over Count Six.<sup>39</sup> They argue this failure to respond constitutes a waiver of any opposition and alone is grounds for the Court to grant the Toll Defendants' Motion to Dismiss.<sup>40</sup> In addition, Toll Defendants argue that Plaintiffs' Consumer Fraud claim is untimely, as it was filed after the three-year

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<sup>34</sup> Pls.' Answ. Br. Opp'n Toll Defs.' Mot. to Dismiss at 11.

<sup>35</sup> *Id.* at 12–13.

<sup>36</sup> *Id.* at 13–16.

<sup>37</sup> *Id.* at 16–20.

<sup>38</sup> *Id.* at 21. There has been no motion filed by the other Defendants and it appears there is no assertion by any Defendants that the claims would not remain against the non-parties to the Contract or Warranty if the Court was to find in Toll Defendants' favor.

<sup>39</sup> Toll Defs.' Reply Br. Mot. to Dismiss at 1.

<sup>40</sup> *Id.* at 4.

statute of limitations.<sup>41</sup> It is important to note that the Toll Defendants do not address Plaintiffs' assertion that there are two competing arbitration clauses, nor do they even address the Warranty's arbitration clause.

The instant motion is not a straightforward motion to dismiss based on lack of subject matter jurisdiction as Toll Defendants suggest in their short briefings. However, Toll Defendants correctly identify Delaware's strong policy of enforcing valid arbitration agreements,<sup>42</sup> such that the enforcement of these agreements may "divest[] the courts of this State of the power they would otherwise have to hear a dispute."<sup>43</sup> This jurisdiction also follows the standard that if two arbitration provisions compete, the later-in-time provision controls.<sup>44</sup>

Toll Defendants assert that Plaintiffs' Count Six is controlled by the binding arbitration provision in Section 11 of the Contract, rather than the later in time provision found in the Warranty.<sup>45</sup> Plaintiffs contend that Section 10 of the Contract explicitly provided that the parties' rights or liabilities would be determined "as expressly set forth in the [Warranty.]"<sup>46</sup> In fact, the Warranty provided that the

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<sup>41</sup> *Id.* at 4–5.

<sup>42</sup> *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429–30 (Del. Ch. 2007). In fact, the Delaware Superior Court has previously enforced arbitration absent a "showing that arbitration would work a fraud on insureds or deprive them of substantial justice on their claim for damages."

<sup>43</sup> *Airbase Carpet Mart, Inc. v. AYA Associates, Inc.*, 2015 WL 9302894, at \*5 (Del. Super. Ct. Dec. 15, 2015).

<sup>44</sup> *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at \*5 (Del. Ch. Jan. 31, 2007).

<sup>45</sup> Toll Defs.' Mot. to Dismiss at 3.

<sup>46</sup> Pls.' Answ. Br. Opp'n Toll Defs.' Mot. to Dismiss at 12.

Wangs “have the right to pursue remedies other than conciliation and binding arbitration.”<sup>47</sup> Thus, the Plaintiffs argue the previous Arbitration was non-binding under the Warranty. The Court believes that the Contract’s arbitration provision and the Warranty’s arbitration provision compete. Thus, the later-in-time provision controls.

However, before the Court can even discuss the findings from the Arbitration and the effect on its jurisdictional right to continue with the litigation, the Court must discuss two preliminary issues: whether it ordered binding arbitration and whether the arbitration provisions of the Contract or the Warranty prevail. The most important of these two underlying issues is whether or not the Court ordered the parties to engage in binding arbitration. The binding effect of the arbitration impacts the remaining issues. Based on the parties’ briefings and comments made at oral arguments and the October 23, 2017 office conference, the Toll Defendants seem to believe the Court ordered binding arbitration, while the Wangs believe it was non-binding. The Wangs are correct. The Court suggested that the parties engage in arbitration and in no way implied that it was binding nor has the Court issued an opinion or order finding the arbitration provision of the Contract or Warranty was controlling. It was obvious to the Court that expensive continual litigation would not be helpful to getting Plaintiffs’ house fixed nor in the best interest of Toll

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<sup>47</sup> *Id.*

Brothers, who had an excellent reputation in the building community. This is evident in the Court's ruling during the August 2015 Motion to Dismiss hearing.<sup>48</sup> The Court was clear that it was hesitant to enforce the contractual arbitration provision as there was a conflict between the Contract and Warranty arbitration clauses.<sup>49</sup> This hesitation makes it more than obvious that the Court's suggestion that the parties first go to arbitration—clearly meant non-binding arbitration. In hindsight, this good faith effort by the Court to hopefully get the parties to come to a reasonable, common sense resolution of this dispute merely provided the parties more grounds to advance legal arguments instead of addressing the real issues of this litigation. This is clearly unfortunate since, as is so often the case, the parties are now only making litigation decisions and not good business ones.

This present dispute arises from the conflicting arbitration provisions found in the Contract and the Warranty.

The relevant portions of Section 10 and 11 of the Contract state:

Limited warranty: seller agrees to provide buyer a 10 year limited warranty (the 'home warranty'). A copy of the home warranty is available at the sales office. Except as expressly set forth in the home warranty, seller shall have no liability or obligation whatsoever after settlement with respect to the premises or this agreement. Seller's liability under the home warranty or this agreement or arising in any way out of the construction, delivery, sale, or condition of the premises

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<sup>48</sup> Office Conference Tr. 18:2–23:23; 19:1–3.

<sup>49</sup> *Id.* at 25:3–22.

shall be limited to the repair of the premises in accordance with the home warranty standard...<sup>50</sup>

ARBITRATION: Buyer hereby agrees that any and all disputes arising out of this Agreement, the Home Warranty or the construction or condition of the Premises including, but not limited to, disputes concerning breach of contract, express and implied warranties, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action (“Claims”) shall be resolved by binding arbitration in accordance with the rules and procedures of Construction Arbitration Services, Inc. or its successor or an equivalent organization elected by Seller.<sup>51</sup>

The Warranty contains different arbitration language than the Contract. Section VII, Conciliation and Binding Arbitration Provision, provided that “Binding Arbitration is provided as a remedy for resolving disputes between YOU and US that arise from or relate to this BUILDER'S LIMITED WARRANTY.”<sup>52</sup> It also states:

[a]ny disputes between YOU and US or OUR insurer related to or arising from this BUILDER'S LIMITED WARRANTY that cannot be settled through conciliation may be resolved by binding arbitration. Although YOU may have the right to pursue remedies other than conciliation and binding arbitration, election of other remedies may bar YOU from pursuing this same claim under this BUILDER'S LIMITED WARRANTY.<sup>53</sup>

Because the Warranty prescribes different dispute resolution mechanisms from the Contract, the Court must decide which of the two is controlling. As the

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<sup>50</sup> Contract ¶ 10.

<sup>51</sup> Contract ¶ 11.

<sup>52</sup> Warranty §VI, at 10.

<sup>53</sup> Warranty §VII, at 10. The Court notes that page one of the warranty indicates that the “WE”, “US”, and “OUR” used in the document refers to the BUILDER.

Chancery Court found in *Country Life Homes, Inc. v. Shaffer*, “[w]hen a later-in-time contract addresses the same issues (here, the means of dispute resolution and the rights to be asserted), it will prevail in the absence of evidence to the contrary.”<sup>54</sup> Since the Warranty agreement came at a later date, the Court must follow Delaware law and find that its language will control, as nothing in the Contract contradicts this presumption. Instead, quite the opposite is true. Section 10 of the Contract explicitly provided that the parties’ rights or liabilities would be determined “as expressly set forth in the Home Warranty....”<sup>55</sup> Perhaps even more significant, the Contract reflected that once settlement occurred the Toll Defendants would have no liability or obligation regarding the sales contract. This provision makes it clear that once settlement occurred, the buyers would have to look to the Warranty for any relief regarding deficiencies in their home construction. For the Toll Defendants to now argue that this Court should enforce the binding arbitration provision of a Contract they abandoned at settlement is simply hypocritical. Thus, the Warranty’s provision controls and other remedies are a plausible means of dispute resolution.

This is particularly true in the case of home construction contracts and warranties, as the purchaser of the home did not negotiate or create either form document. If there are conflicts between the contract and warranty documents, they

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<sup>54</sup> See *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at \*5 (Del. Ch. Jan. 31, 2007).

<sup>55</sup> Contract ¶ 10.

should be resolved in favor of the homeowner, who is in an inferior position and has little or no ability to negotiate the terms of the documents. In addition, the Warranty is a marketing device for the contractor/builder and is sold as a “comforting” document so that any construction issues will be covered by the Warranty. For the builder to now suggest that the Court should abandon the Warranty in favor of the Contract is disingenuous at best.

In addition, while the Warranty provision cited above implies some limitation “may” exist for asserting claims under the limited warranty if other remedies are pursued, the Court can’t find what that limitation may be anywhere in the 42-page Warranty document. If the insurance company that issued and wrote the Warranty and the builder who purchased the insurance wanted to limit disputes under the Warranty to binding arbitration, they could have written one that clearly expressed this limitation. They failed to do so and instead provided the buyer with a complex, lengthy document that counsel even finds difficult to interpret. The Court simply is unable to interpret the documents to mean that any action under the Warranty must be resolved by binding arbitration or that, if another remedy is pursued, the buyer forfeits their rights under the Warranty.

Since the Court finds a non-binding arbitration occurred, it follows that it continues to have jurisdiction over all counts and the Arbitration award should not be entered as a judgment in any court, [and] the award may not be cited as evidence

or precedent, with any preclusive effect, in any court, arbitration, or other proceeding.<sup>56</sup>

Finally, the Court notes that the Warranty document is the only one that specifically references the builder Toll Brothers and the guarantees it is providing to the buyers. The sales contract is between Hockessin Chase L.P. by Tenby Hunt Inc. and Plaintiffs. While the Court is not privy to who these entities represent or whether, as it suspects, they were simply created by Toll Brothers to build this development, it does seem fair to hold the builder liable under the one document where they are specifically named as a party.

Moreover, the Court disagrees with Toll Defendants' statute of limitations argument.<sup>57</sup> Although Toll Defendants correctly identify the proper statute of limitations is three years, "[a] cause of action accrues on the date plaintiff can first bring an action. Put another way, the limitations period 'begins to run at the time of the wrongful act.'"<sup>58</sup> The Plaintiffs may have received the deed for the Property in 2002, but the first sign of damage and leaks was not until September 2013. Therefore, the statute of limitations was not triggered until the leaks—the wrongful

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<sup>56</sup> Non-binding Arbitration: An Introduction, Dispute Resolution Journal, available at <http://www.jonesday.com/files/publication/266ff349-03e1-4610-a7c1-6cd0f951e8bb/presentation/publicationattachment/1d047cae-3d31-4b6b-b280-71ed96efa8e5/bennett,%20steven%5B2%5D.pdf> (last visited May 25, 2018).

<sup>57</sup> Toll Defs.' Reply Brief at 4.

<sup>58</sup> *Pender v. Daimlerchrysler Corp.*, 2004 WL 2191030, \*3 (Del. Super. Ct. July 30, 2004) (citing *Curran v. Time Ins. Co.*, 644 F. Supp. 967, 972 (D. Del. 1986); *David B. Lilly Company, Inc. v. Fisher*, 18 F.3d 1112, 1117 (3d Cir. 1994)).



acts—occurred in September 2013. The statute of limitations did not begin to run in 2002, when the Wangs received the deed for the home. All of the Plaintiffs' claims are timely.

Thus, for these reasons, the Court is not in a position to grant Defendants' Motion to Dismiss Count Six for lack of subject matter jurisdiction. The Court also believes the decision here resolves Defendant's Motion to Dismiss Counts One through Five, and that Motion, to the extent it remains pending, is denied.

#### IV. CONCLUSION

For the following reasons, Defendants' Motions to Dismiss are **DENIED**.

IT IS SO ORDERED.

  
Judge William C. Carpenter, Jr.